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IN THE

Supreme Court of The United States

OCTOBER TERM, 1951

NO. 1

GEORGIA RAILROAD & BANKING COMPANY,
Appellant,

VS.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER,
Appellee.

MOTION OF APPELLANT TO TERMINATE CONTINUANCE AND DECIDE APPEAL

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Atlanta, Georgia
Of Counsel for Appellant

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MOTION OF APPELLANT TO TERMINATE CONTINUANCE AND DECIDE APPEAL

Appellant, Georgia Railroad & Banking Company, moves the Court to terminate the continuance of the cause under the order entered February 20, 1950, to-wit:

> "Per Curiam: Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy and efficient state remedies were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies."

and to assign the case for reargument and to hear and decide the case

GROUNDS OF MOTION

In the oral argument before this Court on February 13, 1950, the Attorney General of Georgia, counsel for the appellee,

stated to the Court that appellant had a plain, speedy and efficient remedy in the courts of Georgia. This Court asked the Attorney General what such remedy was. The Attorney General replied that such remedy was by appeal from the assessment of the State Revenue Commissioner to the Superior Court of Georgia.

The proceedings on oral argument before this Court were not reported, but the above facts were confirmed in writing and were not denied by the appellee (App. p. 6).

Appellant, on the other hand, both in its brief and in oral argument, insisted that it had no remedy in the courts of Georgia, or that if such remedy existed it certainly was not "plain".

Based on the assertion of the Attorney General in oral argument, however, this Court entered the order quoted above.

In compliance with said mandate of this Court, appellant took an appeal with all convenient speed from the assessment of the State Revenue Commissioner to the Superior Court of Richmond County, Georgia, and from the judgment of that Court appealed to the Supreme Court of Georgia.

The Supreme Court of Georgia has now held that the asserted remedy by appeal from the assessment of the Commissioner to the State Court is not available to appellant and has directed that the proceeding be dismissed for lack of jurisdiction in the Superior Court. A motion for rehearing was filed and has been denied. The opinion of the Supreme Court appears in the Appendix at page 7-21.

There is no other remedy available to appellant in the courts of Georgia.

The Supreme Court of Georgia has expressly declined to indicate what remedy, if any, is available to appellant, although requested to do so. *Musgrove* v. *Georgia Railroad & Banking Co.*, 204 Ga. 139, 159.

Three Justices of the Supreme Court have stated:

> ". . . Any other construction [than that the remedy by appeal exists] leaves uncertain and indefinite how a railroad company, or similar body, can have its tax liability adjudicated in the courts.
>
> . . . . .
>
> ". . . From a study of the provisions of Title 92 of our Code, we are constrained to the view that there is no part of our law more perplexing and confusing than the Code provisions relating to procedures involved in the administration of those laws. There exists much confusion as to the matter of affidavit of illegality, and other procedure for a taxpayer of the kind here involved to raise the issue of taxability. The history of this litigation demonstrates that confusion." *Georgia Railroad & Banking Co.* v. *Redwine*, App. p. 19-20.

Nothing has been said to the contrary by any of the other Justices.

Appellee has admitted that since it has been determined that appellant does not have the right of appeal, there is no other remedy available to appellant in the courts of Georgia. In his motion for rehearing to the Supreme Court of Georgia (par. 7, p. 3) he said:

> "In deciding sua sponte that the Act of 1943, supra, took away the only available method open to the Railroad to review judicially the question of its taxability ad valorem, the court overlooked and failed to decide, as movant insists it should have done, whether the Act of 1943 was in this respect unconstitutional as denying to the Railroad

due process of law in violation of the Fourteenth Amendment to the Federal Constitution and that of the State Constitution, Art. I, Sec. I, Par. III (Code Sec. 2-103)."

And in his brief in support of his motion for rehearing (p. 14) he said:

> "The construction placed upon the Act of 1943 takes away from the Railroad the only remaining method for judicial determination of questions of taxability. Therefore, if the meaning of the Act of 1943 is correctly construed it is to that extent unconstitutional as violating the due process clause of the Fourteenth Amendment to the Federal Constitution and of Article I, Sec. I, Paragraph III of the Constitution of Georgia."

Appellant has now tried and been denied three remedies in the courts of Georgia:

> (1) By action for declaratory judgment, *Musgrove* v. *Georgia Railroad & Banking Co.*, 204 Ga. 139, appeal dismissed 335 U. S. 900;
>
> (2) By suit to enjoin the State Revenue Commissioner in the State Court, *Musgrove* v. *Georgia Railroad & Banking Co.*, supra;
>
> (3) By appeal from the assessment of the State Revenue Commissioner to the Superior Court, *Georgia Railroad & Banking Co. v. Redwine*, App. p. 7.

Appellant has been attempting with utmost diligence to obtain an adjudication of the merits of this case since October 15, 1945. While the assertion has repeatedly been made that there were ample and "plain" remedies available to appellant, each such remedy attempted by appellant has been denied without consideration of the merits of the case. Meanwhile, if appellant is ultimately held liable, taxes at the rate of over $100,000 a

year is accruing. Already nearly $2,000,000 have accrued. Since this liability is being denied no income tax deduction is being allowed.

Appellant therefore respectfully requests the Court to terminate the continuance and decide the appeal.

Respectfully submitted,

ROBERT B. TROUTMAN
FURMAN SMITH
Counsel for Appellant

Before the undersigned, an officer authorized to administer oaths, personally appeared FURMAN SMITH, who, being sworn, says on oath that he is counsel for appellant in the above case and that the facts stated in the foregoing motion are true.

FURMAN SMITH

Sworn to and subscribed before me this the 15th day of August, 1951.

EUGENIA H. BROOK
Notary Public

APPENDIX

1. Letter confirming statement made in oral argument.

March 30, 1950

Hon. M. H. Blackshear
Deputy Assistant Attorney General
State Capitol
Atlanta, Georgia

Dear Hardeman:

Re: Georgia Railroad
& Banking Company
v. Redwine,
Revenue Commissioner

Inasmuch as the Supreme Court based its order of February 20 on what was said orally, dehors the record, and in order that there may be no misunderstanding between us in the future, we feel it desirable to conform in writing what has been said, as follows:

1. You stated in oral argument at the bar of the Supreme Court that Georgia Railroad & Banking Company had a plain remedy in the courts of Georgia to contest the tax proposed to be assessed against it. The Court then inquired of you what such remedy was. You then stated that the remedy was by appeal from the assessment of the Revenue Commissioner as provided in Sec. 1 of the Act approved January 3, 1938, as amended by the Act approved February 17, 1943.

2. You further stated in oral argument in the Supreme Court that Georgia Railroad & Banking Company had the right to file with the Revenue Commissioner a protest against the proposed assessment and that, on such protest, it could raise all of its constitutional objections to the tax and that it was the duty of the Revenue Commissioner to consider and decide such questions and that, if he were convinced that the proposed tax was contrary to the Constitution, to sustain the protest and quash the proposed assessment

3. We have stated to you, Mr. Cook and Mr. Davidson that in our opinion Georgia Railroad & Banking Company does not have any remedy by appeal and that the State Court may well dismiss such remedy on its own motion. We therefore suggested to you that you bring suit against the railroad in the Superior Court to collect such tax. We stated that in our opinion the Revenue Commissioner and the Attorney General had a plain right to bring suit in the courts of Georgia to collect the tax and that, in such case, the Georgia Railroad & Banking Company would undoubtedly have the right to file answer raising all of its defenses to such tax and that, in such case, the courts of Georgia would have unquestionable jurisdiction to determine the issues involved. You have stated to us that the Revenue Commissioner and the Attorney General will not bring such suit in the courts of Georgia but intend to proceed by assessment and the issue of execution against the Georgia Railroad & Banking Company.

Yours very truly,

Furman Smith

FS:eb

CC: Hon. Eugene Cook
Attorney General
State Capitol
Atlanta, Georgia

Mr. Victor Davidson
Irwinton, Georgia

2. Opinion of Supreme Court of Georgia holding remedy of appeal does not exist.

Supreme Court of Georgia.

No. 17467. Georgia Railroad & Banking Company v. Redwine, Commissioner.

Decided June 13, 1951.

By the Court:

1. When a trial court, in a case over which it has, as to

subject-matter, no jurisdiction, renders therein any judgment except one of dismissal, this court will of its own motion reverse the same whether exception to it for want of jurisdiction in the court below be taken in the bill of exceptions or not.

2. There is no law of force in this State authorizing an appeal to the superior court by a railroad company whose property has been assessed by the State Revenue Commissioner for ad valorem taxation; and the appellate jurisdiction of the superior court must be exercised, and can only be exercised, in those cases where the right of appeal thereto is provided by law.

Candler, Justice. On May 26, 1950, Charles D. Redwine, as State Revenue Commissioner for Georgia, assessed for ad valorem taxation certain real and personal property in this State belonging to the Georgia Railroad and Banking Company and notified the Company that the assessment as made by him would become final after the expiration of thirty days therefrom unless a written protest was filed thereto. The assessment so made was for the years 1939 to 1950, inclusive, and was for State, county, municipal and school district taxes at the rate fixed for all other like property in this State for each of the years mentioned. The Company was also notified that appropriate adjustments would be made for the taxes which it had previously paid during the years involved at the rate of one-half of one per cent. of its net earnings. On June 22, 1950, the Company filed a written protest, alleging that the assessment was illegal because its property was, for reasons therein stated, exempt from all ad valorem taxes. After a hearing, the Commissioner sustained the validity of his assessment and the Company took an appeal to the Superior Court of Richmond County. By final decree that court likewise sustained the assessment as made and the exception here is to that judgment.

1. It is argued by counsel for plaintiff in error that the trial court had no jurisdiction to entertain an appeal in this case from the State Revenue Commissioner's final decision. If that be true, the judgment complained of is a nullity and must be reversed. Code, § 110-709; Head v. Bridges, 67 Ga. 227;

Fussell v. Dennard, 118 Ga. 270 (45 S. E. 247); Jones v. Smith, 120 Ga. 642 (48 S. E. 134); Franklin County v. Crow, 128 Ga. 458 (57 S. E. 784). The parties to litigation cannot give to a court jurisdiction of the subject-matter of a suit when it has none by law; and when a trial court, in a case over which it has, as to subject-matter, no jurisdiction, renders therein any judgment except one of dismissal, and the case is brought here for review upon a writ of error, this court will of its own motion reverse the judgment whether exception to it for want of jurisdiction in the court below be taken in the bill of exceptions or not. Smith v. Ferrario, 105 Ga. 51 (31 S. E. 38); O'Brien v. Harris, 105 Ga. 732 (31 S. E. 745); Cutts v. Scandrett, 108 Ga. 620 (34 S. E. 186); Kirkman v. Gillespie, 112 Ga. 507 (37 S. E. 714); Dix v. Dix, 132 Ga. 630, 633 (64 S. E. 790). And in the circumstances of this case it cannot be said that the plaintiff in error is by conduct estopped to assert the trial court's lack of jurisdiction to entertain and render final judgment on its appeal thereto. "Jurisdiction of the subject-matter of a suit cannot be conferred by agreement or consent, or be waived or 'based on an estoppel of a party to deny that it exists.'" Langston v. Nash, 192 Ga. 427, 429 (15 S. E. 2d, 481), and the cases there cited.

2. The right of appeal from one court to another is not a common law right, but depends on statute; and the same authority which bestows it may likewise withhold or withdraw it. Griffin v. Sisson, 146 Ga. 661 (92 S. E. 278). Our Constitution of 1945 provides that the superior court shall have appellate jurisdiction "in all such cases as may be provided by law," and in DeLamar v. Donnar, 128 Ga. 57, 66 (57 S. E. 85), it was said: "The appellate jurisdiction of the superior court must be exercised, and can only be exercised, in such cases as are provided by law." Therefore, we must look to and find authority in our statutes for the right of appeal to the superior court in this case if it exists as counsel for the defendants in error insist. By Chapter 92-59 of the Code of 1933 all persons or companies owning or operating railroads, street railroads, suburban railroads or sleeping cars; and all persons or companies, including railroads, doing an express, telephone, or telegraph business in this State are among those who were re-

quired to make annual tax returns of all property owned by them, and located in this State, to the Comptroller General. Code, § 92-5902. The Comptroller General was required to carefully scrutinize the returns so made to him, and if in his judgment the property embraced therein was returned below its value, or the return was false in any particular, or in any wise contrary to law, he was required within 60 days thereafter to correct it and assess the value, from any information he could obtain. Code § 92-6001. Also, if the Comptroller General found that any owner of such property had refused or failed to make a return of it for taxation, he was authorized by section 92-6103 of the Code, after giving the owner thereof 20 days notice in writing, to assess it for State, county, municipal and school district taxes, from the best information obtainable as to its value. However, no provision for an appeal from the assessment of the Comptroller General was provided for in either event; but if the owner of such property disputed his assessment as to taxability, by section 92-6104 of the Code he was permitted to raise that question by petition in equity in the Superior Court of Fulton County; and if dissatisfied with the assessment as to value, his remedy was by arbitration under section 92-6001 of the Code. And later, by section 80 of the reorganization act of 1931 (Ga. L. 1931, p. 33), the owner of such property was permitted to contest the question of its taxability by an affidavit of illegality. Code § 92-7301. See also, in this connection, Hicks v. Stewart Oil Company, 182 Ga. 654 (4) (186 S. E. 802); and Carreker v. Green & Milam, Inc., 183 Ga. 864 (189 S. E. 836). The legislature by an act approved January 3, 1938 (Ga. L. Ex. Sess. 1937-38, p. 77), created the State Department of Revenue and vested in a State Revenue Commissioner all of the powers and duties respecting taxation previously performed by the Comptroller General. A State Board of Tax Appeals, consisting of the comptroller general, the auditor, and the treasurer, ex officio, was created by the act and section 19 thereof declares, in part, that "The function of the Board of Tax Appeals shall be to review the assessments made by the State Revenue Commissioner when by such assessments, after hearing by the Commissioner or his regularly authorized employee or agent, any taxpayer may be

aggrieved and petition for said review." Section 45 of the act also provides that "The findings by the Board of Tax Appeals shall not be final; but either party may appeal from any order, ruling, or finding of the said Board to the Superior Court of the county of the residence of the taxpayer unless the taxpayer be a railroad or other public service corporation or non-resident, in which event the appeal of either party shall be to the superior court of the county in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in this State, maintains his office." Accordingly, by the act of 1938 provision was made by the legislature for a review of the decision of the board of tax appeals (created by the act for the purpose of settling disputes as to valuation and taxability) by the superior court in a de novo investigation when a dissatisfied taxpayer entered an appeal thereto from the board's decision. See Columbus Mutual Life Insurance Co. v. Gullatt, 189 Ga. 747 (8 S. E. 2d, 38). But, except as shown above, the taxing act of 1938 made no provision for an appeal to the superior court for the review of any question. The legislature, however, in 1943 passed an act (Ga. L. 1943, p. 204), which, in several respects, materially changed the act of 1938. By section 2 of it, all of the sections in Chapter III of the act of 1938, which created the board of tax appeals and defined its jurisdiction, were expressly repealed and new sections were enacted in lieu thereof. Concerning the right of appeal, section 18 of the amending act of 1943 reads as follows: "Except as otherwise provided by this act, all matters, cases, claims, and controversies, of whatsoever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner or the Department of Revenue, as conferred by this act, shall be for determination by the State Revenue Commissioner, subject to review by the courts as provided for by section 45 of Chapter IV of this act. The effect of this section shall be that, except as hereinafter provided, all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under section 45 of this act in the same manner, under the same procedure, and as fully, as if the same had been considered and passed upon by the State Board of Tax Appeals." But section 19 of

the amending act of 1943 expressly declares that, "The provisions of the foregoing section with reference to reviewing assessments of the State Revenue Commissioner shall not apply to assessments for ad valorem taxation against any person, corporation, or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem tatxation to the Comptroller General and is now required by such Chapter and this act of January 3, 1938, to make such returns to the State Revenue Commissioner." We can not agree with counsel for the defendants in error that the exception referred to in section 18 and expressly stated in section 19 of the amending act of 1943 has reference to an assessment of value only. An examination of the taxing act of 1938 discloses that the State Revenue Commissioner has power to determine the taxability of property as well as authority to fix its value for taxing purposes and the act of assessing such property for taxation includes a determination of the former as well as an ascertainment of the latter. Forrester v. Pullman Company, 192 Ga. 221, 222 (15 S. E. 2d, 185). According to Black's Law Dictionary (3d ed.), the word "assessment" when used in connection with the subject of taxation, includes all of the steps necessary to be taken in the legitimate exercise of the power to tax. Therefore, it seems very clear to us, from the plain language employed, that the legislature by sections 18 and 19 of the amending act of 1943 provided for an appeal to the superior court, under the procedure described by section 45 of the act of 1938, from any final ruling, order, or judgment of the State Revenue Commissioner, except any final ruling, order or judgment of the Commissioner respecting assessments for ad valorem taxation against any person, corporation, or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property to the Comptroller General for tatxation and who now by the act of 1938 is required to make such returns to the State Revenue Commissioner, among which are railroad companies. Consequently, we must and do hold that our statutes make no provision for an appeal to the superior court from the decision of the State Revenue Commissioner by a railroad company whose property has been assessed by the commissioner for ad valorem taxation. That

being true, the Superior Court of Richmond County had no jurisdiction to entertain the appeal in this case; and the judgment complained of is for that reason a nullity and must be reversed.

Judgment reversed. All the Justices concur, except Duckworth, C. J., and Atkinson, P. J., who dissent; Pharr, Judge, presiding for Head, J., who is disqualified, concurs specially.

Duckworth, Chief Justice and Atkinson, Presiding Justice, dissenting. For the reasons stated in division 1 of the special concurrence of Judge Pharr we dissent from the opinion of the majority and do not concur in the judgment of reversal upon the ground upon which the majority judgment is based. Since, under the ruling made by the majority the merits of the case are not passed upon, we, therefore, intimate no opinion with reference to the merits.

Pharr, Judge, concurring specially. 1. For the reasons hereinafter set forth, I am compelled to dissent from the foregoing opinion upon the question of jurisdiction.

Originally, all railroads were required to make their tax returns to the Comptrolier General (Code, § 92-5902). There was some uncertainty under the Reorganization Act of 1931 (Ga. Laws 1931, p. 7) as to what duties were left with the Comptroller General, but by section 4 of the Act of 1938 (Ga. Laws 1937-38, pp. 77, 80) all duties relating to matters of taxation theretofore vested in the Comptroller General were vested in the State Revenue Commissioner. The 1938 act as changed by the amendment of 1943 (Ga. Laws 1943, p. 204) is now codified in the Pocket Parts Ga. Code Annotated and reference will be made to the sections as they appear there.

Without the excepting clause Section 92-8426.4 provides in part as follows: ". . . all matters, cases, claims and controversies, of whatsoever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner or the Department of Revenue, as conferred by this Chapter shall be for determination by the State Revenue Commissioner, subject to review by the courts as pro-

vided for by section 92-8446. The effect of this section shall be that, ... all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under section 92-8446."

Section 82-446 (which is the codification of Section 45 of the 1938 Act) provides in part as follows: "Either party may appeal from any order, ruling, or finding of the said Commissioner to the superior court of the county of the residence of the taxpayer, unless the taxpayer be a railroad or other public service corporation or non-resident, in which event the appeal of either party shall be to the superior court of the county in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office."

Under the language of these sections, without the excepting clauses, any final ruling, order, or judgment of the Revenue Commissioner may be appealed to the Superior Court, and it appears clear that this would include any ruling, order, or judgment in which the taxpayer is a Railroad Company. Thus, unless the *determination of liability* for ad valorem tax of a Railroad is specifically excluded, or excepted then a Railroad may appeal such a ruling to the Superior Court.

Section 92-8426.4 contains at the beginning the words, "except as otherwise provided by this law (92-8426.4 to 92-8426.6)" and in the second sentence "except as hereinafter provided." From this language and from a careful scrutiny of all three sections it appears that the only exception is that set out in 92-8426.5. The pertinent parts of that section are as follows:

"The provisions of section 92-8426.4 with reference to reviewing assessments of the State Revenue Commission shall not apply to assessments for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller General and is now required by such Chapter and this Chapter to make such returns to the State Revenue Commissioner. The State Revenue Com-

missioner shall carefully scrutinize such returns made to him, and if in his judgment the property embraced therein is returned below its value or the return is false in any particular, or in any wise contrary to law, he shall, within 60 days thereafter, correct the same and *assess the value*, from any information available. If any such person, corporation, or company shall be *dissatisfied with the assessment or correction of such returns* as made by the State Revenue Commissioner or the Department of Revenue, such taxpayer shall have the privilege, within 20 days after notice of such assessment and correction, *to refer the question of true value or amount to arbitration* as provided by Chapter 92-60 of the Code of Georgia of 1933. Such arbitrators shall consist of one chosen by the taxpayer and one chosen by the Governor. . . The decision and award of the arbitrators or of the arbitrators and the umpire shall be subject to appeal and review in the same manner as decisions and orders of the State Revenue Commissioner are subject to appeal and review under the terms of section 92-8446."

The words "with reference to reviewing assessments" are different from the language used in the preceding section. The preceding section gives the Revenue Commissioner the broad power to make a determination of all matters, cases, claims, and controversies of whatsoever nature arising in the administration of the Revenue laws, and gives the right of appeal from all final rulings, orders and judgments of the Commissioner. the word "assessments" is not used.

Thus, we must determine whether the words "assessments for ad valorem taxation" (against a railroad) as used in Section 92-8426.5 means the determination of the single issue of tax liability of a railroad where there is no question of valuation.

At first glance and because of the broad and varied meanings given to the word "assessment" in statutes, decisions and common usage the right of appeal by a Railroad may seem to be excluded. However, in order to determine the present issue it is necessary to give careful consideration to the meaning of the word "assessment" as used in this section and endeavor to ascertain what the Legislature intended in using it as it did.

While the language used says "the provisions of the preceding section with reference to reviewing assessments" nothing is said in the preceding section with reference to reviewing assessments. The preceding section deals only with the power of the Commissioner to determine all matters, cases, claims, and controversies of whatsoever nature and it further says that the effect of the section shall be that all final rulings, orders and judgments of the Commissioner shall be subject to review. By referring to the preceding section, it is apparent that "assessment" is embraced in the larger power of determining all cases, claims, matters and controversies of whatsoever nature and is included somewhere in rulings, orders and judgments. Thus, the exception carves out of the orders, rulings and judgments only the assessment portion. To break it down a little further, we should look to the language of section 92-8426.5 in which the word "assessment" is used to see if there is any indication from other language exactly what is meant by the word "assessment." The whole purport of section 92-8426.5 is that on questions of valuation, an appeal may be had to arbitration and from there an appeal to the Superior Court. Thus, the whole of section 92-8426.5 seems intended to deal only with the matter of providing the opportunity for arbitration of valuation. Section 92-8426.5 says that the Commissioner shall scrutinize the returns and "assess the value." It says that if any such person be dissatisfied with the "assessment" he may refer the question of "true value or amount" to arbitrators. All through this section it is apparent that it is dealing with the question of fixing value and not with the question of taxable liability. Thus, if any light is thrown on the use of the word "assessments" in the first sentence by the other provisions of Section 92-8426.5, it is that "assessment" means the determination of true value or amount. No mention is made of determining tax liability. The word "assessments" is used in the third sentence, wherein it is provided that if the taxpayer "be dissatisfied with the assessment" he may "refer the question of true value or amount to arbitrators." It seems to us inescapable that the word "assessment" used in the third sentence, just referred to, is so tied in with the rest of the sentence as to mean only the question of true value or amount. Now, if it means valuation in the third

sentence, does it not mean valuation in the first sentence? There is no indication of any intention to attach a different meaning to the same word used twice in the same section. If it means value, or valuation, or fixing value in the third sentence, then is it not logical to say that it means the same thing in the first sentence? If assessment means the fixing of value in the first sentence, then it would read to the effect that the provisions of the preceding section with reference to the reviewing of valuations fixed by the State Revenue Commission shall not apply to determinations of value for ad valorem taxes against a railroad. To construe it that way makes sense. To construe it that way does not take away the right of appeal from a determination of tax liability.

Let us analyze it another way. What does the word "assessment" mean? Its origin is from the Latin word "assessare," which means to value for taxation. In Webster's New International Dictionary, 2nd edition, 1947, one of the definitions of "assess" is "to value", and one of the meanings of "assessment" is "valuation of property for the purpose of taxation." It is true that other definitions are given. In Dunn v. Harris, 144 Ga. 157, on page 163 the Court said: "Assessment is quasi judicial, and consists in making out a list of the taxpayer's taxable property and *fixing its valuation or appraisement.*"

In the case of Columbus Mutual Life Ins. Co. v. Gulfatt, 189 Ga. 747, the Court discusses "assessment" at some length and shows a distinction between "assessment" and "taxability." On page 752, it is said: "The arbitrators are to 'fix the assessments.' This can only mean that they are to determine valuation." And on page 753, the Court says: "In most of the acts relating to tax assessments passed since 1910 provision is made for contesting the taxable value of property by arbitration. . . ." And further the Court says: "It will thus be seen that while there have been exceptions in one or two instances from the general rule of determining *valuation* by arbitration, in no instance has the legislature departed from the policy of permitting contests of taxability to be determined by the Superior Courts."

Thus the Court not only shows the distinction between taxability and "assessment" as valuation, but also indicates the general policy of the legislature in providing arbitration for valuation and contests of taxability by the Superior Courts. That general scheme and plan is carried out in the present act under consideration if the word "assessment" is not given a broader definition than it justly deserves.

Of course, a great deal of the confusion is brought about by the loose use of the word "assessment." Common usage has brought it to mean anything relating to the imposition of taxes and it is not uncommon to use the expression as synonymous with levying a tax, imposing a tax, fixing tax liability, or determining value. But in the ad valorem taxing process, the present case is a good illustration of what occurs. First, of courses, there must be a law imposing the tax. Second, there must be a determination of tax liability against the person or corporation. Third, there must be a determination of the value of the property taxed ad valorem, and fourth, the necessary proceeding to enforce the tax. Upon analysis, it will appear clear that only the third step is the assessment step, that is, where the value of the property is determined, the act of assessment is performed. No assessment can be made until the second step is complied with, and that is the determination of taxability. So, in the present case the Commissioner made a determination of tax liability. The assessment followed by virtue of the agreement, both of the taxpayer and the Commissioner, on the valuation of the Railroad's property. The only issue raised was the taxability, not the valuation or assessment, and since no question of valuation was involved there could be no appeal to arbitration. But since a determination of taxability was made by the Commissioner, that was a final ruling, order and judgment of the Revenue Commissioner. By the appeal in this case, it is not sought to review the assessment, but only to review the determination of taxability. Thus, section 92-8426.5 does not apply to this case because there is no attempt to review the assessment, but only the ruling of taxability. The validity of the assessment, would depend upon the validity of the ruling of taxability.

If the words "Shall not apply to assessments for ad valorem taxation against" a railroad embraces the determination of liability rather than simply the determination of property and value, then the law means that every taxpayer except a railroad has the right to appeal the legal determination of his liability for taxes to the superior court, and a railroad is given the right to appeal to superior court only where the question of true value or amount is concerned, by demanding arbitration, and thereafter appealing to the court. Such a construction would mean that every taxpayer could have all questions of liability, property and values appealed to the superior court, except that railroads could not have the sole question of liability or taxability determined by the superior court on appeal, even though it, like all other taxpayers, could have all other questions determined by appeal to the superior court. As we view it, *Section 92-8426.5* simply means that where questions of value or amount are involved, railroads shall have a right to demand arbitration before appealing to the superior court.

In the present case, there is no controversy between the commissioner and the railroad as to value and the word "assessment" is not used by the commissioner in making his determination of liability on May 26, 1950. The only question is that of determination of liability by virtue of the contention of the railroad that it is not subject to ad valorem taxes as such, but only to the tax fixed upon its net income by its charter. That the commissioner has the power to determine this question under section 92-8426.4 is without doubt and we do not believe that the language of section 92-8426.5 excludes the railroad from appealing this determination directly to the court.

It seems to us from all of the language used that a sound, common-sense construction of the provisions of the act of 1943, as codified in the sections referred to, and the provisions of section 45 of the 1938 Act, as codified, means that from a determination of liability the railroad may appeal directly to the superior court, and that the only exception to the right of appeal of any taxpayer is that where value or amount is involved upon a return of a public service corporation arbitration shall first be had before appealing to the superior court. Any other con-

struction leaves uncertain and indefinite how a railroad company, or similar body, can have its tax liability adjudicated in the courts. Why should that remedy be clouded or denied by a construction of language, which if susceptible of two constructions, ought to be construed as affording a clear, speedy, and direct path for the judicial determination of a taxpayer's liability?

While the taxpayer owes the State the duty of paying every tax legally imposed upon him, the State owes him a corresponding duty of good faith in providing a means of having a judicial determination of whether or not he is subject to the tax imposed. We are fortified in our determination of the issue under consideration by the fundamental conviction that it is right and just for the taxpayer to have this opportunity for an adjudication by the court of the question of taxability. From a study of the provisions of Title 92 of our Code, we are constrained to the view that there is no part of our law more perplexing and confusing than the Code provisions relating to procedures involved in the administration of those laws. There exists much confusion as to the matter of affidavit of illegality, and other procedure for a taxpayer of the kind here involved to raise the issue of taxability. The history of this litigation demonstrates that confusion. It is our belief, that one of the purposes of the 1938 and 1943 laws was to clarify rather than add to that confusion. We believe the construction herein placed upon those sections will result in that clarification, and we therefore conclude that the railroad had the right to appeal from the decision of the commissioner to the superior court, and that this court has jurisdiction to determine the case now before us.

2. The majority of the court being of the opinion that the court does not have jurisdiction, a discussion of the other issues in the case would be of only academic interest. As written, my views on the fundamental principles involved are somewhat voluminous and it would be a useless burden upon the record to add them here. It is sufficient, therefore, for me to say that in my opinion the determination of liability for ad valorem taxation against the plaintiff in error in this case was erroneous.

It is by virtue of this conclusion that I concur in the judgment of reversal.

ORDER ON MOTION FOR REHEARING ENTERED JULY 24, 1951

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

DUCKWORTH, C. J.

ATKINSON, P. J.

and JUDGE PHARR dissent.